

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

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COMPLETE TITLE OF CASE:

STATE OF MISSOURI

Respondent

v.

JOSEPH J. DRAKE

Appellant

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**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

DOCKET NUMBER WD78996

DATE: March 28, 2017

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Appeal From:

Circuit Court of Jackson County, MO  
The Honorable Marco Roldan, Judge

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Appellate Judges:

Division Four  
Mark D. Pfeiffer, Chief Judge Presiding, Thomas H. Newton, and Anthony Rex Gabbert, Judges

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Attorneys:

Damien De Loyola, Kansas City, MO

Counsel for Appellant

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Attorneys:

Christine Lesicko, Jefferson City, MO

Counsel for Respondent

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**MISSOURI APPELLATE COURT OPINION SUMMARY  
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

STATE OF MISSOURI, Respondent, v.  
JOSEPH J. DRAKE, Appellant

**WD78996**

**Jackson County**

Before Division Four Judges: Pfeiffer, C.J., Newton, and Gabbert, JJ.

Drake appeals a judgment convicting him of two counts of first-degree statutory sodomy, one count of first-degree child molestation, and one count of enticement of a child. At trial, the jury observed a video recording of an interview between the child victim and a Children's Division investigator. During this interview, the victim stated that Drake began touching her private area with his hand when she was six years old and continued until she was nine. During the interview she also stated that Drake showed her "bad magazines" and unsuccessfully attempted to touch her "bikini" with his "private." At the conclusion of trial, the jury was given identical instructions for counts one and two for first-degree statutory sodomy, as well as instructions for count three, child molestation, and count four for enticement of a child. Drake did not object to these instructions. The jury returned guilty verdicts on all counts. Drake appeals.

**AFFIRMED IN PART AND REVERSED IN PART.**

**Division Four holds:**

In the first point, Drake asserts that the trial court erred in overruling his motions for acquittal and entering a judgment of conviction on count III, first-degree child molestation. He asserts that the State failed to produce sufficient evidence to establish that he touched the victim with his genitals as required by the jury instruction. We disagree.

The jury heard testimony from the Children's Division investigator describing the videotape interaction where the victim disclosed genital contact with Drake. The testimony of a single witness is sufficient to support a conviction, and the credibility and weight of such testimony is an issue for the jury to determine. Thus, although Drake asserts that this testimony is ambiguous, it is reasonable to believe that after hearing this testimony and viewing the victim's interview, the jury inferred that Drake did touch the victim with his genitals. Point one is denied.

In the second point, Drake argues that the trial court erred because in a multiple-act case, jury instructions must specifically identify the facts of each charge and must include an instruction informing the jury that jurors must agree on a specific act to find the defendant guilty. He asserts that no specific acts were provided for instructions 5 and 6. We agree.

The Missouri Constitution guarantees the right to a unanimous jury verdict, meaning the jurors must substantially agree on the defendant's act as a preliminary step to determining guilt. Therefore in cases involving multiple acts, the state must select one particular criminal act to support each charge, or the verdict director must instruct the jury to unanimously agree on at

least one specific act to support each charge. Here, the State explained that multiple charges were provided because the acts of sodomy occurred more times than the victim could count. The jury instructions, however, fail to specifically identify a specific act relied on to support each charge. Therefore, Drake was not granted the constitutional protection of a unanimous jury and is entitled to a new trial on these charges. Point two is granted.

In the third point, Drake raises the same error for a multiple-act case as to instruction 7. We disagree.

While the victim's interview provides a general description of her encounters with Drake, she provides a description of only one incident of attempted genital contact. Further, the language of instruction number 7 specifically requires that the jury find "the defendant touched [the victim] on her body with his genitals." Therefore, because of the specific language of the instruction and the specific nature of the evidence, it is unreasonable to conclude that the jurors were not in substantial agreement as to Drake's alleged act of child molestation. Point three is denied.

In the fourth point, Drake raises the same error for a multiple-act case as to instruction 8. We disagree.

During the victim's interview with the Children's Division investigator, the victim stated that Drake showed her bad magazines but does not indicate that this occurred on multiple occasions. Thus, because there is no evidence of multiple distinct criminal acts, it is reasonable that the jury's conviction of Drake was unanimous and specific. Point four is denied.

Therefore, we affirm in part and reverse in part.

Opinion by Thomas H. Newton, Judge

March 28, 2017

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